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Re: Wagner, Gary M. vs. Grand Bahia Del Los Suenos S. De R.L. De C.V., et al.
Reference No. 1220042150

I, Christy Arceo, not a party to the within action, hereby declare that on June 20, 2012 served the attached 1) STATEMENT OF DECISION, and 2) JUDGMENT on the parties in the within action by electronic mail at Los Angeles, CALIFORNIA, addressed as follows:

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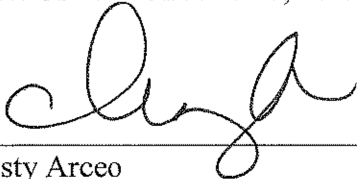
I declare under penalty of perjury the foregoing to be true and correct. Executed at Los Angeles, CALIFORNIA on June 20, 2012.



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SUPERIOR COURT OF CALIFORNIA
LOS ANGELES COUNTY

GARY M WAGNER, Plaintiff, Versus GRAND BAHIA DEL LOS SUENOS S. DE R.L. DE C.V., PAUL JENNINGS, JOSEPH FRYZER, Defendants.	Case No. SC 110 354 (JAMS Case No. 1220042150)

STATEMENT OF DECISION
(CCP Section 632; California Rules of Court 3.1590)
(June 19, 2012)

Introduction. In this action plaintiff Gary Wagner asserts claims against the defendants named above arising out of a transaction in which Wagner sold rights in a real property development and received in return a profit participation and other consideration, all as further detailed below.

The undersigned is the referee appointed under CCP 638 by the court's order of January 13, 2011 to hear and decide all issues in the case.

The complaint originally asserted causes of action for breach of contract, breach of the covenant of good faith, breach of fiduciary duties, and fraud. Wagner alleged that defendants Jennings and Fryzer were alter egos of the corporate defendant Grand Bahia. Ruling on defendants' demurrer, the referee held that the claims for breach of fiduciary duties and fraud were defective. The referee granted plaintiff leave to seek to revive those claims at completion of discovery, but plaintiff did not seek to do so.

Trial on the remaining claims was had for three days commencing October 31, 2011, Laurie Howard appearing for plaintiff, and Jules Kabat and Robert Gookin appearing for defendant. Testimony was taken from four witnesses, and extensive documentary evidence was received. Following the hearing the parties submitted briefs, and oral argument was had December 19, 2011.

On February 23, 2012 the referee issued his tentative statement of decision. Among other things, the tentative decision found the defendants to be the prevailing parties for purposes of an award of attorneys fees and costs. Defendants were invited to submit an application for fees with appropriate supporting evidence.

There followed an interval during which the parties prepared and submitted briefing regarding the attorneys' fee issues, and Mr. Wagner also filed his objections to the tentative statement of decision. Oral argument on these issues was heard April 9, 2012.

The referee has now fully considered the post tentative decision briefs and arguments, including the objections to the tentative statement of decision, and Mr. Wagner's argument that the evidence established an anticipatory breach by the defendants, impeaching the conclusions in the tentative decision, including the decision that defendants were the prevailing parties. The following addresses all of these issues, modifying in some respects the substantive conclusions, but affirming

the conclusion that defendants are entitled to attorneys fees and costs as prevailing parties, and addressing and setting the appropriate quantum of fees and costs.

Statement of the Case. The claims arise out of or are related to a Participation Agreement (Agreement) dated April 17, 2008 concerning real property situated in the "Bay of Dreams" in the State of Baja California near La Paz, Mexico, [Ex 1]. The claims are pleaded in a complaint filed in Los Angeles Superior Court on November 15, 2010, before the matter was referred to the undersigned pursuant to a judicial reference clause in the Agreement. The complaint's allegations are summarized as follows:

Plaintiff is Gary Wagner, currently a resident of Colorado. Defendants are: Grand Bahia Del Los Suenos S. De R.L. De C.V., (Grand Bahia), a corporation organized under the laws of Mexico; Paul Jennings, and Joseph Fryzer. Parties to the Agreement include Mr. Wagner, the Wagner family trust, Rancho De Cosia Plenty SRI de CV, Stephen Games, and Grand Bahia. Defendants Jennings and Fryzer are not parties to the Agreement, but are alleged in the complaint to be owners of all of the stock of Grand Bahia, and to be the alter egos of that entity. The complaint alleged fraud and breach of fiduciary duty by Jennings and Fryzer, who are alleged to be the alter egos of defendant, and sought punitive images and consequential damages.

Wagner and his partner Games purchased the property, 4,000 acres of undeveloped land, in 1999. Wagner initially invested $333,000. Wagner and Games developed plans for a residential resort development with homes, a golf course, a hotel, a restaurant, an airstrip, and other amenities. Defendants Jennings and Fryzer became interested in the development around 2007. Initially they purchased lots; later they offered to purchase the development from Wagner and Games.

The Agreement recites that Wagner and his trust are owners of interests in a project to develop the property. The crux of the Agreement is that Wagner transfers his interests to Grand Bahia, in exchange for "certain economic benefits" and "certain project amenities". Importantly, Wagner also is fully relieved from all further liability respect to the project and from any future capital calls for the project.

The Agreement specifically provides that: the individual owners of Grand Bahia, including Jennings and Fryzer, are to have no personal liability; no party owes fiduciary duties to another; punitive damages may not be recovered, nor lost profits nor other consequential damages.

The Agreement provides for transfer to Wagner of six lots, including numbers 70, 126, 127 153, 154, and 102 [Participation Agreement, Exhibit 1, paragraph 9.] Subparagraph a of paragraph 9 specifies that "all of the infrastructure improvements to each session lot will be included at [Grand Bahia's] cost..." No provision of the Agreement specifies when the infrastructure is to be finished, nor what infrastructure is required. Wagner testified that the practice on the project was to install infrastructure when someone started building a home. And, he admitted that no homes are being built on any of his lots, nor are there plans to build.

Transfer of the lots is to occur "as soon as is practicable, but no later than the Deadline." [9d] The "Deadline" is a defined term requiring submission to the Mexican government by June 30, 2008 of all documentation needed to effect the transfers. This deadline was several times extended by consent of the parties, so that the final agreed deadline was July 15, 2008 [Ex 2]. Defendants claim they timely submitted all documentation; Wagner says only subdivision information, and not other documentation, was filed.

The Agreement's "time of the essence" provision affixes a $150 per day penalty to delays beyond the "deadline". An exception allows extension of the deadline for each day of delay caused by circumstances beyond the parties' control. Any delay damages accrued are to be paid only by way of an addition to or subtraction from Wagner's capital account.

The Agreement contains an integration clause [paragraph 33]. Disputes are required to be submitted to a judicial reference [28c], and costs of the reference as well as reasonable attorneys' fees and costs shall be recovered by the prevailing party [28d].

The other provisions of the Agreement relevant to the dispute include the following:

Wagner is to receive a "Participation Interest Payment" of $2 million "commencing with the closing of the first lot sale to occur after the transfer of lots 8, 9, 10, 42, 45 and 46, 47 and 48" [Exhibit 1, paragraph 5a]. Once this sum is due and unpaid, Wagner is further entitled to repayment of the balance of his original and second capital account. But, these amounts are to be paid only from net proceeds of lot sales, initially at the rate of 5%, increasing to 10% after the interests of one Mr. Brito are paid off. No time limit is specified for completion of performance of this obligation [Exhibit 1, par, 5b, c].

Subparagraph 9b makes Grand Bahia solely responsible for the costs of transferring these lots, including title insurance costs. The Agreement requires that Wagner's lots be staked. [9j]

Wagner is entitled under the Agreement to a free membership in the golf club to be established, and to free rounds of golf on the course, as well as other perquisites, including use of hotels and spas constructed on the project, use of the airport, and water usage. Wagner urged at trial that his rights in this regard were superior to those of other founders and owners. For this he relied principally on

two memoranda created years after the agreement [Exhibit 61, 62] But, the written integrated agreement, in paragraph 17, repeatedly states that his rights are the same or equal to those granted to other founders (paragraph 17, "same perquisites and privileges as those granted to the other founders…").

The Agreement requires Grand Bahia to construct a retaining wall and a protective wall at the 15th Tee on the golf course, adjacent to one of Wagner's lots.

The Agreement is a lengthy and detailed instrument. The same law firms representing the parties in this lawsuit represented them in the negotiation and drafting of the Agreement.

The project has been an economic failure. Putting aside the failed sale of the project to Manana Estrella, discussed in detail below, only one or two lots have been sold since Wagner sold the project to Jennings and Fryzer. Jennings and Fryzer offered evidence that they have personally invested $70 million in the project. In the Fall of 2008, not long after the parties entered into the agreement, the deep recession of 2008 began. Reports of criminal violence in Mexico are quite widespread. Defendants offered evidence that an airplane was stolen at gunpoint from the airport near the project, probably sometime in 2006.

Of the eight lots identified in paragraph 5a, all were in escrow at the time of execution of the Agreement. It is undisputed that the parties to the Agreement intended the proceeds of the sale of these lots to provide working capital for the project, and so exempted them from availability for a profit participation to Mr. Wagner. Of these lots, only lot 45 remains unsold. This lot was in escrow to be sold to a Hal Smith at the time of the Agreement. Smith had deposited $500,000 in earnest money, and agreed to pay a total of $1.8 million for the lot. That sale eventually fell through after years of efforts to push it to completion.

During its ownership by Jennings and Fryzer, the project has steadily lost large quantities of money. The weight of the evidence shows ongoing expenditure

of $400,000 per month. This expense, uncompensated by lot sales or project revenues, led to efforts by Jennings to sell the project, beginning around August 2010 or earlier. Sale to one Jeff Dingman was considered, and a memo dated August 15, 2010 [Exhibit 62] listed and detailed the obligations owed to Wagner and the other founders of the project, and proposed they relinquish most of their rights under the Agreement in order to facilitate the sale to Dingman. Thus founder Oliver was scheduled to give up a paved road with underground utilities, an airport hangar lot, two golf memberships, a boat storage lot etc. Similar concessions were asked of Mr. Games. It was proposed that Wagner receive $250,000, but otherwise give up his various rights, infrastructure, golf memberships airport rights, homeowner dues waiver, etc. The memo doesn't repudiate the obligations—it acknowledges them and proposes most of them be given up.

Jenning's August 30, 2010 e-mail to Games, Wagner and others forwarded a memorandum [Exhibit 212] prepared in anticipation of a meeting to discuss the decision to sell the project. The memorandum began by referring to the difficult economic conditions, the absence of revenues from lot sales or other activities, and the need to bring to an end the "$400,000 per month burn rate." The memo explained that without a sale of the project it would be necessary to shut down the golf course and/or to obtain the cooperation of founders to forgo their perquisites and future economic participations. The memo went on to offer "Decision Choices" or "Options."

The Dingman transaction under consideration in the August memorandum did not materialize, but another potential buyer was found. On October 8, 2010, Grand Bahia signed a letter of intent to sell the project to an entity called Manana Estrella (ME) [Exhibit 5]. The LOI specifically provided that it was not binding, except for certain limited obligations. It further contemplated the preparation and

execution of a definitive agreement. That agreement was not signed until December 30, 2010, [Exhibit 6, Manana Contract] and called for Grand Bahia to sell a large portion of the project to ME, for a total price of about $18 million. [Exhibit 6.] The Manana Contract required a $1.5 million deposit which Mañana funded with a loan in that amount from Joe P_______, a long time employee of Mr. Jennings's telecommunications company. The balance of the purchase price obligation was evidenced by two promissory notes, Note A and Note B. The notes provided that title to the property sold would transfer upon full payment of the purchase price secured by the Notes [section 2, exhibits 9, 10]. The original deadline for payment of Note A was in January 2011, with Note B to be paid in June 2011. These deadlines were several times extended, and no payment ever was made on either note. Grand Bahia has advised that the Mañana transaction is dead and the property has reverted to Grand Bahia's ownership.

The Mañana Contract contains an extensive list of nearly 60 "assumed contracts," but not including the Participation Agreement with Wagner in issue in this proceeding. The Contract does acknowledge the pendency of Wagner's lawsuit, and further requires defendant to indemnify buyers against claims or obligations imposed in favor of Wagner under the Agreement. The Mañana Contract also obliges the buyers to afford "VIP rights" to Wagner, Oliver, Jennings and Fryzer, including 150 rounds of golf at 25% of the published rate, and reduced landing fees and water fees.

Wagner testified that Jennings told him that, because the project had been sold, Grand Bahia would no longer honor its obligations to provide free golf, and other perquisites. Grand Bahia maintained this position on into the arbitration. For example, its demurrer, in attacking Wagner's 7th count for declaratory relief, stated in part "because the subject real property has been sold, there is no future conduct to be declared."

Jennings and Fryzer claimed in their 2010 tax returns that the project had been sold, entitling them to $50 million in deductions for losses. Ms. Russell, controller for the project, so testified, and acknowledged that with the sale to Mañana reversed, an amended tax return will have to be filed.

The parties dispute whether lot 45 has been "transferred" within the meaning of section 5a of the Agreement, thus causing Grand Bahia's obligation to pay Wagner a participation share from lot sales to ripen. Wagner points to the tax returns, and to several other contemporaneous writings, as evidencing that a "transfer" has occurred. Grand Bahia counters that no transfer occurred until title was vested in Mañana, which could occur only upon payment of Note B-- an event that has not occurred and is not going to occur.

Wagner contends defendants breached by failing to procure title insurance in connection with transfer of his lots. He offers, though, no evidence that he attempted to buy insurance, or to invoice or otherwise seek reimbursement from defendants.

At the referee's express request, Wagner supplied with his post trial brief (Exhibit D) a damage recapitulation, which the referee summarizes as follows:

Actual Damages	
Description	
Participation lot 26	$26,075
Participation ME bulk sale	$75,000
Failure to consult before reducing lot 6 price	TBD
Failure to install infrastructure Wagner lots	$1,942,425
Failure to provide title insurance	$12,000

Failure to timely transfer lots	$3,000
Failure to provide golf memberships	$750,000
Failure to mark lot corners	$12,000
Failure to build improvements 15th tee	$33,134
Failure to provide free golf	$1,642
Failure to provide restaurant discounts	$118
Failure to provide golf memberships	$750,000
Failure to provide airport privileges	TBD
Failure to invite Wagner to meetings	TBD
Failure to provide financial statements	TBD
Failure to require ME to honor obligations to Wagner	TBD
SUBTOTAL	$3,606,094
Liquidated Damages	
Delay in transferring lots	$570,000
Delay in providing title insurance	$1,878,000
Delay in staking Wagner lot corners	$1,502,400
Delay in improvements at 15th Tee	$412,500
Failure to clean up beach contamination	$128,550
Failure to timely provide financial statements '08 to '11	$744,800
SUBTOTAL	$5,236,250
TOTAL ACTUAL AND LIQUIDATED	$8,842,344

As can be seen, Wagner's summary double counts for failure to provide golf club memberships, twice claiming $750,000 for this item. Various claimed items of damages remain "to be determined", though this submission was made after the evidence was concluded. Further, the liquidated damages claimed constitute the bulk of the damages. As to these, six of the seven items claimed duplicate items for which actual damages are claimed. And, the liquidated damages are vastly disproportionate to the actual damages claimed for these items. For example, actual damage of $12,000 is claimed for failure to provide title insurance, but $1.8 million of liquidated damages is claimed for delay in providing title insurance. Actual damage for failure to mark lot corners is claimed to be $12,000, but liquidated damages are claimed in the amount of $1.5 million.

Discussion.

Participation Interests And "Trigger Lots." Foremost among the several breaches alleged, Wagner claims that the ME transaction has resulted in a transfer of lot 45, the last unsold lot referred to in section 5a, so that Grand Bahia is now liable to give him his participation share from the proceeds of sales of subsequently sold lots. (The Agreement does not use the word "trigger," nor did the parties use the term during negotiations or performance, but the parties have used this during the litigation as a convenient description of the effect of defendant's contention that selling the eight lots "triggered" the participation obligations.)

But, it is undisputed that the Manana transaction has been aborted without any payments on either under Note A or Note B. The Notes explicitly state that transfer will occur only when full payment is made. Section 5a of the Participation Agreement requires the participation payments only after *all* of the eight lots there identified have been "transferred." This construction is not only true to the literal language of the Agreement and the Mañana sale documents. The underlying intent of the Agreement was that Grand Bahia have the proceeds from the specified eight

lots as working capital before it was required to distribute or credit sales participation shares to Wagner. This will not be finally achieved unless and until a buyer has *paid* for lot 45. Further, it is typical in real estate transactions that title is not transferred until payment is made, and that is the way the Agreement and the Mañana transaction are structured.

Wagner points to language in the Manana documents indicating a sale has occurred, and to Grand Bahia's tax returns claiming a sale has occurred. But, the documents unequivocally require payment of the Notes before title transfers, and the practical reality is that the sale has not been consummated. Grand Bahia concedes an amended tax return must be filed. The intent of the Agreement was that Grand Bahia receive payment for the eight lots before the participation obligations ripened. Wagner himself made only a small initial contribution, and admitted freely in testimony that the business plan was to fund development from lot sales.

Wagner also argues he is entitled to a share of the $1.5 million up front payment by Manana. But, as urged above, his right to a profit share from lot or bulk sales will not ripen until Lot 45 is sold. He will be entitled to share in sales *after* that.

If and when a buyer has *paid* for lot 45, Grand Bahia will have the obligations in paragraph 5. Defendants have not actually breached paragraph 5.

<u>Covenant of Good Faith</u>. Wagner alleges that defendants deliberately delayed selling lot 45 in order to deprive him of the benefits of the Agreement, in violation of the covenant of good faith and fair dealing. There is not one iota of direct evidence to support this claim--no documents revealing such an intention, no evidence of contemporaneous statements, no testimony. Further, no reason has been suggested as to how this would benefit the defendants. There have been at most one or two lot sales since the Agreement was signed, so that defendants have

had no plausible motive to delay selling lot 45 to deny participation benefits to Wagner. Only with prospective sale of the lots in the Mañana transaction did the possibility of participation payments in the near term materialize.

Wagner argues that defendants dragged out the sale of lot 45 to Hal Smith, a transaction in escrow when the Agreement was signed. But again, there is no direct evidence to support this, and defendant's commercial incentives ran strongly against it. Smith had contracted to pay $1.8 million for the lot, and deposited $500,000. Defendants were burning hundreds of thousands of dollars each month sustaining the project. Closing the Smith transaction would have yielded immediate substantial cash to apply against these expenses.

By contrast, the obligations they allegedly sought to avoid, payment to Wagner of the participation interests under section 5a, were remote and contingent. The section 5a obligation was limited to sharing with Wagner a small percentage of net sale proceeds from actual lot sales. Wagner's putative share of the only lot sold was a mere $26,000. Lots were not selling. It is implausible that defendants would delay consummation of the Smith transaction, and forgo the immediate substantial cash return, in order to deny Wagner 10% of the net proceeds from lot sales which were not occurring and were unlikely to occur in the face of the greatest recession since the Great Depression.

In short, the weight of evidence is against Wagner's claim for breach of the covenant of good faith.

<u>Transferred Lots</u>. The Agreement required defendant to transfer six lots to Mr. Wagner, and attached a series of additional requirements to this obligation. Wagner alleges breach of a number of these obligations.

<u>Documentation Deadline</u>. Mr. Wagner claims the defendants were a year late in submitting the required documentation for the lot transfers, and seeks $3,000 in actual damages and $570,000 in liquidated damages for the alleged

breach. Grand Bahia's President Mr. Friedman testified that defendants met the extended deadline, citing Exhibit 157, an e-mail from Guillermo Pereznejara (Grand Bahia, corporate affairs) and Exhibit 73, a spreadsheet Friedman testified was prepared by Guillermo showing by lots the dates of "subdivision request to municipality". Wagner's evidence is insufficient to carry his burden to show breach.

Moreover, the Agreement provides (par. 17) that any liquidated damages owed are to be added to Mr. Wagner's capital account (or subtracted if owed by Mr. Wagner) and distributed in accordance with the Agreement, i.e., in payments from lot sales, if there are any. Inasmuch as the "trigger" for participation payments has not yet been pulled, and further, there have as yet been no consummated lot sales yielding proceeds for payout, defendants do not have, and could not have, any current obligation to pay liquidated damages.

Infrastructure. Wagner alleges that defendants have breached the obligations in section 9a to include, at Grand Bahia's cost, "all of the infrastructure improvements" for the lots transferred to Wagner under the Agreement. He asks specific performance of the obligation, or in the alternative $1.9 million in damages.

The Agreement specifies no time limit for completion of the infrastructure, and the parties' conduct demonstrates an implied agreement that infrastructure be provided only as the project progressed. Infrastructure is expensive, and there is no practical reason to extend paved roads or electricity to lots which have no homes upon them. Wagner testified that the practice at the project was to install infrastructure when building started. He offers no proof that defendants have declined to install infrastructure to any lot he owns which has a home upon it, or has plans for construction of a home upon it, or is in prospect of being sold to a third-party desirous of building a home upon it.

Where a contract fails to specify the time for performance, courts imply a reasonable time. The reasonable time for performance of defendants' infrastructure obligation will be the time when the infrastructure becomes reasonably necessary to Wagner's ability to use or sell his lots--a time that has not yet arrived.

Defendants have not breached the infrastructure obligation.

Title Insurance. Section 9b of the Agreement specifies that Grand Bahia is solely responsible for the cost and expense of transferring the lots to Wagner, including the cost of title insurance. Wagner claims that defendants have breached this promise by failing to procure the required insurance. He asks actual damages of $12,000 and liquidated damages of $1.8 million.

The Agreement obliges defendants to bear the *cost* of title insurance. This is typical in real estate transactions, where the seller usually pays for the title insurance. But, the Agreement does not require defendants to *procure* the insurance. The prospective insured is the buyer or transferee, who is also the applicant for the insurance. The seller has no insurable interest in property it has sold. Mr. Wagner offers no evidence that he applied for or purchased title insurance or requested defendants to pay for such insurance. In the absence of such evidence, there is no breach.

Lot Staking. The Agreement specifies (section 9j) that within 90 days after its date Grand Bahia will mark the corners of each of Wagner's lots. Mr. Wagner contends that defendants breached this obligation, and asks for actual damages of $12,000 and liquidated damages of $1.5 million.

In response, defendants cite: an e-mail from Wagner's withdrawn expert, Craig Winburn [Exhibit 322], stating that before Winburn left the Bay of Dreams in May 2010 all Wagner's properties were properly staked; an open items list [Exhibit 57] showing the lots staked as of June 16, 2008; an e-mail from Friedman to Wagner dated in October 2008 [Exhibit 44] confirming the lots were correctly

staked. Winburn subsequently e-mailed Wagner stating he wasn't sure the lots were 100% correctly staked [Exhibit 250].

Wagner fails to prove a breach of this provision by a preponderance of the evidence.

Golf Club Membership. Under paragraph 9i Grand Bahia agreed to give Wagner a golf course and club membership transferable to the buyer of each of the six lots without cost to Wagner or the buyer. Under paragraph 17c it agreed to give Wagner and family free memberships in any project clubs. Wagner alleges breach of these provisions and claims damages of $750,000, based on the $150,000 price for a membership in a fully developed golf resort at Quarencia.

As to the memberships attached to lots, Wagner's claim is premature. He offers no evidence of sale of any of his lots to a buyer to whom a membership could be awarded.

As to the family memberships, the introductory section of paragraph 17 explains that Wagner is entitled only to the same memberships as other founders and owners. He offers no evidence that other founders and owners have been given golf club memberships. The explanation for this is straightforward: there is no golf club at the project. There is a playable golf course, but it is incomplete, lacking restrooms (except portable toilets), golf cart pathways, clubhouse, restaurant, and other facilities. There have been no lot sales to fund construction of these fundamental golf club amenities.

Wagner claims damages equal to the cost of membership in fully built developed golf clubs elsewhere in Baja, which are not remotely comparable to the unfinished course at Grand Bahia.

If and when there is a golf club at the project, Mr. Wagner will have the rights given him in the Agreement. For now, the claim is entirely premature.

15th Tee Walls. Grand Bahia agreed that "as soon as practicable" it would develop a plan to construct a retaining wall for the 15th hole on the golf course, and submit that plan to Wagner for his review and input. It further agreed to construct an additional rock wall to shield the adjoining property from golf balls and to clean up rock and soil deposited on the beach as a result of erosion from the Tee. It is undisputed that thus far the walls and cleanup have not been performed. Wagner claims breach, and seeks actual damages of $33,000 and liquidated damages of $412,500.

Grand Bahia offers undisputed evidence that it submitted a plan to Wagner and solicited his input. As to the unfinished work, it points to the contractual qualifier "as soon as practicable" and argues that the funds for the work were to come from lot sales, just as were the funds to otherwise complete the golf course. It is not practicable to complete the work until lots are sold and funds received. This position is consistent with the practice of the project prior to its acquisition by the defendants. Mr. Wagner conceded in deposition testimony cited in defendants opening statement that neither he nor the other founders had "ponied up" monies for golf course construction, and that instead they had used money from lot sales. "As that money came in, we use that money to fund the golf course. And we basically would go as far as we could go with the money that were able to stimulate through those lot sales."

The referee finds there is no breach of the obligations respecting the 15th Tee.

Audit Rights. The Agreement confers upon Mr. Wagner certain audit rights. In preliminary hearings concerning this right the referee ordered defendants to provide Mr. Wagner with financial information relevant to his participation rights, and defendants complied.

Mr. Wagner also sought a sweeping audit of all the finances of Grand Bahia, seeking to challenge defendants' claims about the amounts they have spent sustaining the project, and to attempt to show that defendants had mismanaged the project and should have earned a profit. The referee rejected this "imputed profits" claim as legally unsustainable, and Mr. Wagner abandoned it at trial.

Mr. Wagner will retain in the future those limited audit rights endorsed by the referee.

Other Claimed Breaches. Mr. Wagner has asserted yet other subsidiary breaches of the Agreement. The referee has explained in detail in the foregoing opinion his grounds for rejecting the variety of primary breaches Mr. Wagner has claimed. The other breaches claimed are likewise rejected as unfounded and/or premature, or both.

Damages and Credibility. Above and beyond the defects in Mr. Wagner's liability theories, detailed above, the manner of his damage presentation warrants great skepticism and justifies rejection of his claims. Putting aside the double count for $750,000 of golf club memberships, the effort to predicate this item of damage upon the cost to join a fully developed, finished golf club, when this project had no such thing, is indefensible. So are the claims on numerous items for huge liquidated delay damages in the face of side-by-side evidence that the actual damages associated with the same claimed breaches are orders of magnitude lower. Liquidated damages are permissible if they represent a reasonable estimation of the potential damages seen at the time of contracting. The huge disproportion between the actual damages and the liquidated damages claimed here strongly suggests the liquidated damages are unreasonable

Also troubling is the inclusion of damage items "TBD" after the evidentiary hearing is concluded.

Damages are the "bottom line" in civil cases. A judge is justified in rejecting claims presented, as here, with a cavalier disregard for the actual harm that has been caused.

Alter Ego. Mr. Wagner attempts to attach liability to Mr. Jennings and Mr. Fryzer, despite the express provision in the Agreement that they should have no personal liability. He has, in any event, failed to establish or even to offer substantial proof of those elements necessary to pierce the corporate veil and establish personal liability. Thus, there is no showing that Jennings or Fryzer: dispensed with corporate formalities, co-mingled assets or funds with the corporation, or otherwise ignored the corporate legal separateness of Grand Bahia. Further, there is no evidence that any fraud or injustice would flow from honoring the Agreement and the corporate form of Grand Bahia and declining to pierce the corporate veil.

Alter ego is an equitable doctrine, and it is appropriate to comment upon the equities here. The Participation Agreement at the center of this dispute relieved Mr. Wagner of all future liabilities for a project that has since disastrously failed. The defendants have invested as much as $70 million of their own money on the project, a figure that contrasts with a relative handful of dollars that Mr. Wagner spent upon it at the outset. The photographs show a beautiful oceanside location, and the referee understands why both Mr. Wagner and the successor owners of the project should love the location and aspire fervently for success of the project. But, the Agreement makes Mr. Wagner's "upside" dependent upon the economic success of the project. Thus far, instead, the project has been an economic catastrophe-- and one borne by the defendants, not Mr. Wagner. His claims are thus not only legally unfounded but equitably unsustainable.

Suggestion to Reopen Evidence. In a recent letter Wagner's counsel advised that Wagner had "just heard" that the ME transaction may not be dead, and that

Roy Oliver has agreed to purchase lot 45. The source of this information was not identified. Wagner's counsel asked defense counsel to respond to these rumors, and to provide an update on the status of the ME transaction and the possible sale of lot 45. Counsel suggested that reopening the evidence might be necessary.

In response, defendant's counsel in writing reaffirmed that the ME transaction is dead and that lot 45 has not been sold, and is not subject to an agreement of sale.

Wagner has not identified the source of the alleged new information, nor made a formal motion to reopen trial, nor shown grounds do so.

Objections To Tentative Statement Of Decision; Anticipatory Breach. Mr. Wagner filed objections to the tentative statement of decision, as permitted by the governing statute and rules. The main argument advanced, and the one stressed at oral argument, was that defendants repudiated the Agreement when they contracted to sell the project to ME without binding that entity to honor all the obligations to Wagner under the Agreement.

Under scrutiny, this objection fails. Wagner cites the August 2010 documents [Exhibits 62, 212] as evidence of repudiation, but these documents do not support this claim. They show Jennings requesting that Wagner and others consent to give up their perquisites and financial participations in light of the project's desperate financial circumstances, in order to facilitate sale of the project to Jeff Dingman. But they do not show repudiation. It is not unusual or sinister in a transaction with large losses to see the big losers pressuring lesser investors to accept concessions. The August memoranda asked for this, and suggested the alternative that Grand Bahia would need to close down the golf course. But the memorandum did not definitely repudiate the Participation Agreement. Nor did defendants single out Wagner for concessions. Each founder was also asked. The transaction with Mr. Dingman under consideration was never consummated.

Further, the ME transaction which followed at the end of the year had not ripened into an arguable repudiation at the time Wagner filed this suit in November 2010. By that time Grand Bahia had not entered into a contract with ME, only the October 2010 nonbinding letter of intent. The LOI [Ex 5] did not arguably transgress or repudiate Wagner's rights under the agreement and did not reveal any intent to water them down. Wagner sued in mid-November 2010, and the ME definitive agreement was not signed until the end of December. Thus there was not an anticipatory breach at the time Wagner sued.

Wagner's brief opposing the defense motion for attorneys fees rhetorically asks "what other options [to filing suit] did Wagner have in the fall of 2010?" The answer is, he had several options. He could have accepted the economic reality confronting the project, and agreed to concessions, as Oliver and Games apparently did, recognizing that Mr. Jennings and Mr. Fryzer had suffered losses orders of magnitude larger and had saved Mr. Wagner from similar losses by taking the project off his hands and assuming his liabilities. He could have waited until there was an actual sale to ME to file suit. It is far from clear that the ME contract entailed an anticipatory repudiation, but it is clear that the letter of intent did not.

Further, Mr. Wagner could have filed a measured demand in arbitration seeking only a declaration of rights and honoring the contractual limits disclaiming fiduciary duties, individual liability, and punitive and consequential damages. His brief argues he was interested in "less expensive, less cumbersome" proceedings, but this is belied by the pull-out-the-stops complaint he filed, which added fraud to the other claims barred by the Participation Agreement. And then, in the same unlimited warfare mode, he pursued for an interval the theory that defendants owed him tens of millions of dollars for mismanaging the project. He abandoned this theory, and the fraud claims, before trial, but continued to the end to pursue an egregiously inflated damage claim.

There is a strong inference that, but for Wagner's suit, ME would have assumed the obligations to Wagner under the Participation Agreement. After all, it assumed 60+ other contracts to which defendant was a party [Exhibit 6, schedule 6.6]. Further, defendant agreed to indemnify ME against any obligations to Wagner which might be imposed by the court interpreting and enforcing the Agreement. The referee can reasonably infer that it was Mr. Wagner's lawsuit which caused omission of the Agreement from the list of contracts assumed by ME.

Throughout the course of this proceeding defendants, rather than repudiate the Agreement, steadfastly affirmed it. Their defense has been that Agreement does not confer the rights Wagner contends for (i.e., participation in profits prior to sale of the 8 "trigger" lots, installation of infrastructure before lot sale proceeds are available to fund) or that project economics don't permit performance of some obligations (creation of a true golf club).

Two additional points further undermine Mr. Wagner's objection.

First, in filing a lawsuit seeking to impose personal liability for breach of fiduciary duties upon Jennings and Fryzer, and for consequential and punitive damages, in violation of the express contractual disclaimers of the right to bring these claims, Wagner himself breached the Agreement. The referee knows of no legal authority nor reason why the disclaimers could be argued to be unenforceable. Mr. Wagner has supplied no such reason. The disclaimers were negotiated between business people represented by counsel. Mr. Wagner simply chose to ignore them when he filed his suit. This prior breach excused defendants from any obligation they otherwise had to assure that Wagner's rights were protected in the ME definitive agreement.

Second, the ME definitive agreement required that Wagner be granted the *same* VIP rights as Oliver, Games, Jennings and Fryzer. Although Wagner has

repeatedly argued that he was entitled to special, additional rights above and beyond those granted to other founders, the integrated written Participation Agreement shows otherwise. The perks and privileges of founders are detailed in numbered paragraph 17 and a series of alphabetical subparagraphs. The introductory numbered paragraph states that Wagner "will receive the same perquisites and privileges as those granted to the other founders, developers, owners and customers". The modifier "same rights" appears repeatedly in the alphabetical subparagraphs. Mr. Wagner's attempt to rely on subsequent correspondence to show otherwise is barred by the Agreement's integration clause and the parol evidence rule. Thus, although the ME contract shrunk Wagner's VIP rights, the requirement in the Agreement for equal treatment with other founders was honored. This shows that defendants did not intend to single Wagner out for different treatment, but only to share the burdens of this 'fire sale' of the project.

Declaratory Relief. Consistent with the foregoing discussion, the court will enter a judgment with the following elements, including declaratory relief:

--Wagner shall take nothing by his claims for monetary damages;

--the Participation Agreement will be declared to be in full force, with the following constructions imposed by the referee based on the evidence received at trial and the relevant law:

--Grand Bahia has no present obligation to share in the proceeds of lot sales on the Participation Agreement, but an obligation consistent with the terms of the Agreement will arise following sale of lot 45;

--Grand Bahia will work in good faith and in a commercially reasonable manner to sell lot 45;

--Grand Bahia has no present obligation to construct infrastructure on Mr. Wagner's property, but that obligation will arise at such time as installation of the infrastructure becomes necessary for the use of one of Mr. Wagner's lots or the

tenants or owners of lots, and sufficient proceeds from lot sales are available to pay for the installation of the infrastructure;

--Grand Bahia shall remain obligated to provide founder member perquisites to Mr. Wagner, as stated in paragraph 17, on the same terms as provided other founders and members;

--Grand Bahia shall be obliged to reimburse Mr. Wagner for the reasonable cost of title insurance, if and when he procures it;

--Mr. Fryzer and Mr. Jennings are not the alter egos of Grand Bahia and not liable to Mr. Wagner for its obligations;

--Grand Bahia shall remain obligated to provide golf club memberships as required in the Agreement, if and when such memberships are offered to other founders and members.

Prevailing Party. In the tentative statement of decision the referee found defendants to be the prevailing party entitled to recover attorneys fees and costs. Wagner argues that, because he will recover a measure of declaratory relief, enforcing provisions of the Agreement in his favor, the referee should find that neither party prevails.

Had Wagner pursued the litigation as a measured quest for a declaration of his rights, perhaps accompanied by a realistic damage claim for what appear to be, thus far, at most very modest damages, the referee might have been inclined to agree. But that is not the way the case was prosecuted. Thus:

--Mr. Wagner sued before a viable claim for repudiation arose;

--Wagner pursued claims for breach of fiduciary duty, alter ego, consequential damages, and punitive damages, despite the fact that the Agreement,

the source of obligations he seeks to enforce, explicitly disclaims the right to these remedies;

–Wagner declined defendant's early suggestion for mutual retention of an independent auditor and instead insisted on hiring his own, then attempting a wide-ranging financial inquiry ostensibly to justify a claim for tens of millions of dollars based on defendants' alleged mismanagement of the project-- a claim that has only the weakest legal basis. Wagner ultimately did not call his accountant as a witness at trial, and abandoned this legal theory:

--Wagner's suit aggregated with his arguably meritorious claims, the additional meritless claims described and rejected above, which his own damage analysis demonstrated to be trivial in the context of this case--for example, the staking and title insurance claims;

--Wagner originally sued for fraud. The referee sustained a demurrer but offered the opportunity to amend later to include evidence discovered to support these claims--an offer he never took up;

--Wagner grossly inflated and exaggerated his damages, as explained above.

In the aggregate, Wagner's approach understandably caused defendants to feel they had to treat this suit as a multi-million dollar threat and to expand their efforts accordingly in its defense.

The relevant legal standard addresses the prevailing party inquiry by asking the question "who attained their litigation objectives?" Here, Wagner largely failed to obtain his, while defendants largely have successfully defended the integrated Agreement as governing the relationship.

Mr. Wagner argues that some of his claims were merely found premature, rather than without merit. But premature claims did not need to be litigated now, and defendants had to expend large sums to secure the determination that the claims were premature.

The referee reaffirms his tentative finding that the defendants are the prevailing parties.

Fee Analysis And Award. Defendants seek $836,000 in attorneys' fees, $62,000 in JAMS fees, and $14,584 in other costs. Wagner mounts a series of challenges to this claim.

First, he urges that Jennings and Fryzer are not parties to the Agreement and therefore are not entitled to recover under its attorney fee clause. This argument is defeated by the California Supreme Court's decision in *Reynold's Metal Co v. Alperson* (1979), 25 Cal 3d 124, in which, on closely similar facts, the court held that two individual defendants not parties to a contract with an attorney fee clause, but sued as alter egos, were entitled to recover fees because they would have had fee liability if the suit had succeeded.

Second, he asserts he should not have to bear attorneys fees incurred pursuing insurance coverage for defendants. But such fees are a normal and foreseeable consequence of bringing a lawsuit. Further, they are a potential benefit to a plaintiff, as they represent a potential source of funds for settlement recovery if the plaintiff wins.

Third, Wagner complains that an excessive number of timekeepers, fourteen, worked on the case. But, of the total of $800,000+ claimed in fees, 93%, or $760,000, is for the work of attorneys, and 98% of this sum is for the time of *two* lawyers, lead counsel and name partner Jules Kabat ($411,000), and associate Robert Gookin ($338,000). The referee has reviewed many fee applications. This distribution is typical: most of the work is done by 2 or 3 lawyers, with a scattering of time by numerous other timekeepers. The referee finds no fault with the staffing of the case. The hourly rates claimed ($600-650 for Kabat, $350-395 for Gookin) are well within the reasonable range in the community.

Next, Wagner argues that fees should be reduced for unsuccessful work, pointing, for example, to the fact that some arguments raised by defense on demurrer were rejected—one instance is the objection in the demurrer to the alter ego claims. Ultimately, though, the arguments prevailed, and raising them early is a normal and reasonable course for defense counsel.

Wagner argues that much of the time billed for associate Gookin should be disallowed, as partner Kabat made all the arguments at court appearances and trial and did all the witness examinations. There are several rejoinders. From long experience with commercial cases the referee can attest that it is customary to have a second, junior lawyer assist the lead lawyer, especially in cases that are document intensive. Further, the justification for this practice increases as the stakes grow larger. As noted elsewhere, Mr. Wagner persisted to the very end in claiming high seven-figure damages.

Mr. Wagner's next argument is that defendants achieved in the decision herein a result only slightly better than they could have achieved by settlement had they accepted the mediator's proposal. At the threshold this argument probably is barred, as defendants urge, by the confidentiality rules surrounding mediation. Even were that not so, Mr. Wagner's argument is unpersuasive. He urges that the result differs from the mediator's proposal only in definitively establishing that the obligation to share in profits has not yet ripened. Respectfully, that is not entirely accurate. The decision resolves against Mr. Wagner a whole series of claims of breach not addressed or resolved by the mediator's proposal—for example, infrastructure, lot staking, title insurance, perquisites. The mediator's proposal did not constitute an evaluation of the case nor all its complexities, but simply represented an effort to fashion a compromise resolution. Having thereafter heard the trial, and assessed the merits of the parties' positions in a more fully informed

and deliberative way, the referee understands why defendants insisted on a resolution more definitive than offered by the mediator's proposal.

A final argument is that the amounts billed for the various tasks simply are more than they reasonably ought to be. For example, Wagner points out that during the 6 weeks before the 3 day trial the defense team billed 11.5 hours every day, 7 days a week. This amounts to two full seven day weeks, or 160 hours, in preparation for each six hour trial day. Here, Mr. Wagner's objection have some merit. The defendants and their lawyers were entitled to spend as much time and money as they chose to prepare the case, but the referee's obligation to scrutinize the fees claimed and award only reasonable fees includes assuring that the losing party does not have to pay for the winner's Maserati or Rolls Royce defense.

There is no precise yardstick to guide an adjustment to address this issue. The referee in his discretion reduces the fees to be awarded to $500,000. This adjustment mitigates any argument that Mr. Wagner is being required to pay for his adversary's premium legal services. The adjusted sum also meets a judge's reality check: it is proportional to the stakes in the controversy as Mr. Wagner framed them and consistent with the outcome. Having asked for $8 million in damages, and waged a sort of unlimited legal war, he should not be surprised at the size of the fee award.

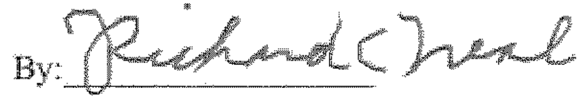
The referee also awards JAMS fees as costs in the sum of $55,000 (defendants claim $62,000 in this category, but JAMS records show only the lesser sum, including the additional time recorded today by the referee's work on this decision over the last week, as defendants' share.) Also awarded are the $14,584 in other costs claimed.

Judgment. Defendants are entitled to a judgment in accordance with the foregoing, including an award of attorney's fees and costs in the amount of $569,584, and the declaration of the parties' respective rights described above. A

form of judgment is executed concurrent with this final Statement of Decision and circulated with it.

The Case Manager, Christy Arceo, is requested to promptly serve this Statement of Decision on counsel.

Dated: June 19, 2012

By: 

Richard C Neal, Referee

Hon. Richard C. Neal (Ret)
JAMS
707 Wilshire Blvd 46th Flr
Los Angeles CA 90017
213 620 1133
Referee For All Purposes

SUPERIOR COURT OF CALIFORNIA
LOS ANGELES COUNTY

GARY M WAGNER, Plaintiff, Versus GRAND BAHIA DEL LOS SUENOS S. DE R.L. DE C.V., PAUL JENNINGS, JOSEPH FRYZER, Defendants.	Case No. SC 110 354 (JAMS Case No. 1220042150)

JUDGMENT

The undersigned is the referee appointed under CCP 638 by the court's order of January 13, 2011 to hear and decide all issues in the case.

The case has now been heard and decided. The procedural history of the case and statement of reasons appear in the final Statement of Decision dated June 19, 2012. The case is now ripe for entry of judgment. Accordingly,

IT IS HEREBY ADJUDGED AND DECREED AS FOLLOWS:

Plaintiff Gary Wagner shall take nothing by his claims for monetary damages, and those claims shall be dismissed with prejudice;

The Participation Agreement which was in dispute in this action is declared to be in full force, with the following authoritative interpretations determined by the referee based on the evidence received at trial and the relevant law:

--Defendant Grand Bahia del Suenos has no present obligation to share in the proceeds of lot sales under the Participation Agreement, but an obligation consistent with the terms of the Agreement will ripen following sale of lot 45;

--Grand Bahia will market lot 45 in good faith and sell it in a commercially reasonable manner as market conditions permit;

--Grand Bahia has no present obligation to construct infrastructure on Mr. Wagner's property, but that obligation will ripen at such time as installation of the infrastructure becomes necessary for the use of one of Mr. Wagner's lots or the tenants or owners of lots, <u>and</u> sufficient proceeds from lot sales are available to pay for the installation of the infrastructure;

--Grand Bahia shall remain obligated to provide founder member perquisites to Mr. Wagner, as stated in paragraph 17, on the same terms as provided other founders and members;

--Grand Bahia shall be obliged to reimburse Mr. Wagner for the reasonable cost of title insurance, if and when he procures it;

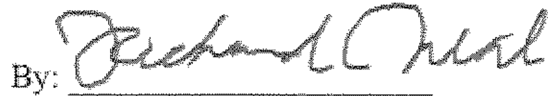
--Grand Bahia shall remain obligated to provide golf club memberships and perquisites as required in the Agreement, if and when, and on the same terms as, such memberships and perquisites are offered to other founders and members;

Defendants have not breached the Participation Agreement;

Defendants Joseph Fryzer and Paul Jennings are not the alter egos of Grand Bahia and are not liable to Mr. Wagner for its obligations;

Defendants are the prevailing parties in the action and are entitled to recover from plaintiff attorneys' fees in the amount of $500,000, arbitration costs of $55,000, and other costs of $14,584.

Dated: June 19, 2012

By: 

Richard C Neal, Referee